

1 **UNITED STATES COURT OF APPEALS**

2
3 **FOR THE SECOND CIRCUIT**

4
5 August Term, 2012

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7
8 (Submitted: February 5, 2013 Decided: July 9, 2013)

9
10 Docket No. 12-2798

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12 - - - - - x
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14 Manuel Pascual, AKA Scarface Gomez,

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16 Petitioner,

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18 - v. -

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20 Eric H. Holder, Jr., United States Attorney General,

21
22 Respondent.

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24 - - - - - x
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26 Before: JACOBS, Chief Judge, KEARSE and CARNEY,
27 Circuit Judges.

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29 Manuel Pascual, a citizen of the Dominican Republic,
30 seeks rehearing of our denial of his petition for review of
31 a Board of Immigration Appeals order, affirming an
32 immigration judge's finding that Pascual was ineligible for
33 cancellation of removal from the United States by reason of
34 his conviction for an aggravated felony. We held that a
35 conviction under N.Y.P.L. § 220.39(1) constitutes,
36 categorically, an aggravated felony conviction under the

1 Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B),
2 and dismissed the petition accordingly. We grant the
3 petition for panel rehearing and adhere to our conclusion.

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5 BENJAMIN M. MOSS, United States
6 Department of Justice Office of
7 Immigration, Washington, DC, for
8 Respondent.
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10 THOMAS E. MOSELEY, Law Offices
11 of Thomas E. Moseley, Newark,
12 New Jersey, for Petitioner.
13

14 David Debold (William Han, on
15 the brief), Gibson, Dunn &
16 Crutcher LLP, Washington, D.C.,
17 Manuel D. Vargas (Isaac Wheeler,
18 on the brief), Immigrant Defense
19 Project, New York, New York,
20 for amici curiae Immigrant
21 Defense Project, The Bronx
22 Defenders, The Brooklyn Defender
23 Services, The Legal Aid Society,
24 Neighborhood Defender Service
25 Harlem, New York County Defender
26 Services, and Queens Law
27 Associates in support of
28 Petitioner.
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32 PER CURIAM:

33 Manuel Pascual, a citizen of the Dominican Republic,
34 seeks rehearing of our denial of his petition for review of
35 a Board of Immigration Appeals (the "Board") decision
36 affirming an immigration judge's ("IJ") ruling that Pascual

1 had been convicted of an aggravated felony, and was
2 therefore ineligible for cancellation of removal. On
3 February 19, 2013, we held that a conviction under New York
4 Penal Law ("NYPL") § 220.39(1) constitutes, categorically,
5 an aggravated felony conviction under the Immigration and
6 Nationality Act ("INA"), 8 U.S.C. § 1101(a)(43)(B), and we
7 dismissed the petition accordingly. See Pascual v. Holder,
8 707 F.3d 403 (2d Cir. 2013). Pascual filed this timely
9 petition for rehearing, supported by several amici curiae.
10 The petition for panel rehearing is granted to consider the
11 issues raised by Pascual and amici. We nevertheless adhere
12 to our affirmance of the Board's decision, and our dismissal
13 of Pascual's petition for relief from removal.

14 15 I

16 We recount only the context that bears upon Pascual's
17 petition for rehearing. Fuller background is set out in the
18 prior opinion: Pascual, 707 F.3d at 404.

19 Pascual's removability depends on whether his 2008
20 state court conviction--for third-degree criminal sale of a
21 controlled substance (cocaine) in violation of NYPL §
22 220.39(1)--constitutes an aggravated felony under the INA.

1 An "aggravated felony" is defined to include "illicit
2 trafficking in a controlled substance (as defined in section
3 802 of Title 21), including a drug trafficking crime (as
4 defined in section 924(c) of Title 18)." 8 U.S.C. §
5 1101(a)(43)(B). A state offense is punishable as a felony
6 under the Controlled Substances Act ("CSA"), 21 U.S.C. §
7 801, et seq., only if it "proscribes conduct punishable as a
8 felony under that federal law." Lopez v. Gonzales, 549 U.S.
9 47, 60 (2006). A state drug offense ranks as an aggravated
10 felony only if it "correspond[s] to an offense that carries
11 a maximum term of imprisonment exceeding one year under the
12 CSA." Martinez v. Mukasey, 551 F.3d 113, 117-18 (2d Cir.
13 2008). See Pascual, 707 F.3d at 405.

14 The IJ concluded that the New York conviction was an
15 aggravated felony, the Board affirmed, and we agreed. The
16 petition was therefore dismissed. See Pascual, 707 F.3d at
17 405. Pascual argued that a conviction under NYPL § 220.39
18 is not categorically an aggravated felony because it would
19 encompass a mere "'offer[] to sell,'" and that such an offer
20 would not violate the federal analog. Id. We ruled that
21 the analogous federal statute, 21 U.S.C. § 841(a)(1),
22 punishes the "'actual, constructive, or attempted transfer

1 of a controlled substance,'" and that therefore, "even if
2 Pascual did no more than offer or attempt to sell cocaine,
3 the state offense would be conduct punishable as . . . an
4 aggravated felony." Id.

6 II

7 The petition for rehearing argues that our holding
8 conflicts with prior Second Circuit case law--in particular,
9 United States v. Savage, 542 F.3d 959 (2d Cir. 2008).

10 Savage appealed his sentence (for possession of ammunition
11 by a convicted felon) on the ground that one of his prior
12 felony convictions was erroneously counted as a "controlled
13 substance offense" under U.S. Sentencing Guidelines (the
14 "Guidelines") § 4B1.2(b). Agreeing, we vacated and remanded
15 for re-sentencing. Id. at 967. Savage held that a prior
16 Connecticut state court conviction for drug trafficking did
17 not categorically qualify as a controlled substance offense
18 under the Guidelines because the Connecticut statute
19 criminalizes some conduct that falls outside the Guidelines'
20 definition; in particular, the Connecticut "statute plainly
21 criminalizes . . . a mere offer to sell a controlled
22 substance[,]" including fraudulent offers, "such as when one

1 offers to sell the Brooklyn Bridge." Id. at 965. Since a
2 fraudulent offer to sell drugs lacks the intent to commit a
3 substantive narcotics offense, it does not amount to a
4 predicate controlled substance offense under the Guidelines.
5 Id. at 965-66.

6 Pascual and amici argue that the Guidelines definition
7 of a controlled substance offense is indistinguishable from
8 the definition of "illicit trafficking in a controlled
9 substance" under the INA. They reason by extension that,
10 because NYPL § 220.39 also criminalizes offers to sell
11 narcotics, a violation of that law is not categorically
12 within the scope of drug trafficking offenses under the INA.

13 This argument rests on a false premise. Unlike the
14 Connecticut statute, NYPL § 220.39 does not criminalize
15 "mere offers" (or fraudulent offers) to sell narcotics.
16 Under New York law, the offer must be "bona fide," and a
17 bona fide offer is one that is made with the intent and
18 ability to follow through on the transaction. See People v.
19 Samuels, 99 N.Y.2d 20, 24, 780 N.E.2d 513 (2002); People v.
20 Mike, 92 N.Y.2d 996, 998, 706 N.E.2d 1189 (1998). A
21 violation of NYPL § 220.39 is therefore categorically
22 conduct within the INA definition of drug trafficking.

1 in the attempted sale of a controlled substance. See United
2 States v. Evans, 699 F.3d 858, 868 (6th Cir. 2012) ("An
3 offer to sell a controlled substance is an act perpetrated
4 in furtherance of a sale, typically as part of the
5 negotiation for the price and quantity, and it is therefore
6 a substantial step in attempting to consummate a sale.").
7 Pascual's argument is therefore meritless.

8 9 IV

10 Amici advance several reasons why we should abandon a
11 categorical approach to convictions under NYPL § 220.39:

12 • Thousands of aliens like Pascual will lose the
13 opportunity to seek discretionary relief from removal. But
14 this impact is negligible because non-citizens who sell
15 drugs in the United States (or make bona fide offers to sell
16 drugs) are unlikely to be strong candidates for
17 discretionary relief.

18 • Fear of conviction for an aggravated felony inhibits
19 aliens from entering guilty pleas, thus burdening the
20 courts. But this burden is offset (and then some) by the
21 efficiencies inherent in a categorical approach, which
22 avoids "the practical difficulties and potential unfairness

1 of a factual approach," Taylor v. United States, 495 U.S.
2 575, 601 (1990).

3 • A prior conviction for an aggravated felony greatly
4 increases the maximum sentence for illegal re-entry and
5 makes it easier for a criminal defendant to achieve the
6 status of recidivist and career criminal. But these
7 consequences are not unintended.

8 * * *

9 Finally, Pascual submitted a letter to the Court
10 pursuant to Fed. R. App. P. 28(j) drawing our attention to
11 Moncrieffe v. Holder, 133 S. Ct. 1678 (2013), which held
12 that "[s]haring a small amount of marijuana for no
13 remuneration" qualifies as only a misdemeanor under the CSA,
14 and therefore does not amount to an aggravated felony under
15 the INA. Id. at 1693. Moncrieffe does not aid Pascual
16 because NYPL § 220.39 criminalizes offers to sell *narcotics*.
17 See infra pp. 6-7. Accordingly, we adhere to our conclusion
18 that Pascual's petition for relief from removal was properly
19 dismissed.